INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on November 3, 1960.

OPINION BELOW

The court of appeals did not render an opinion. Its judgment is set forth in Appendix A, *infra*, pp. 12–13.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1960 (*infra*, p. 12) and the time for filing a petition for certiorari was extended, by order of Mr. Justice Clark, from January 31, 1961 to April 1, 1961 (Appendix B, *infra*, p. 14). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in narrowing *sua sponte* the scope of the Federal Trade Commission's cease and desist order, when respondent had not attacked the breadth of the order before the Commission or in the proceeding to review the legality of the order.[1]

2. Whether the Commission exceeded the discretion vested in it respecting determination of the relief appropriate and necessary to prevent further statutory violations when it prohibited respondent from engaging in conduct found to violate § 2(c) of the Clayton Act without confining the prohibition to transactions between the particular seller and the particular buyer involved in the violation which the Commission had found.

STATUTE INVOLVED

Section 11 of the Clayton Act, as amended by the Act of July 23, 1959, 73 Stat. 243, 15 U.S.C., Supp. I, 21, deals with the Commission's authority to enforce § 2 of the Act. Subsection (a) authorizes the Federal Trade Commission to enforce compliance with §§ 2, 3, 7 and 8 of the Act (except insofar as the section gives other Federal agencies jurisdiction to enforce as against carriers and banks). Subsection (b) provides that if the Commission has reason to believe that any person is violating or has violated any of the provisions of §§ 2, 3, 7 and 8, it shall issue a complaint stat-

[1] A related question is presented in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 654, certiorari granted, March 6, 1961.

ing its charges, and give notice of a hearing thereon. Subsection (b) further provides:

> If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * * in the manner and within the time fixed by said order. * * *

Subsection (c) provides in part:

> Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the [appropriate] court of appeals of the United States * * * by filing in the court * * * a written petition praying that the order of the commission or board be set aside. * * * Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein * * *, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, * * *.

STATEMENT

In this case the Federal Trade Commission, after full administrative proceedings, entered a cease and desist order against respondent Broch and Company (Broch) based on the Commission's determination that Broch, while acting as a broker for Canada

Foods, Ltd., in sales made to The J. M. Smucker Company, had violated § 2(c) of the Clayton Act. On Broch's petition for review, the court below set aside the Commission's order upon the ground that § 2(c) does not apply to the seller's broker, and upon the further ground that Broch had not granted part of his commission, or an allowance in lieu thereof, to the buyer. In *Federal Trade Commission* v. *Broch & Co.*, 363 U.S. 166, this Court held these rulings of the court of appeals to be erroneous, reversed the judgment below, and remanded the cause.

Following the remand, Broch filed a motion to modify the Commission's order.[2] The motion (pp. 5–7) alleged that the order was "unduly broad" in that it covered all transactions in which Broch might act as broker, whereas the evidence and findings related solely to the violation of § 2(c) resulting from the part played by Broch in sales on behalf of one seller to one buyer. The Commission's answer stated (p. 7) that it had adopted as its own the order contained in the hearing examiner's initial decision; that under its rules of practice an appeal from an initial decision shall be in the form of a brief, which must list the questions to be argued; and that Broch's appeal brief had raised no issue as to the scope of the order proposed by the examiner.[3] The Commission

[2] The motion also asked the court to set aside the order, but this requested relief was not granted and is not pertinent here.

[3] The appeal brief is included in the transcript of the record in the court below, filed with this Court in the prior certiorari review (transcript of record in No. 61, October Term, 1959, pp. 156–187). The "questions presented" appear at pp. 167–168 of this transcript.

urged denial of the motion to modify, on the basis of the established principle that a court called upon to review an order of an administrative agency may not consider an issue which had not been raised before the agency (answer, pp. 6–8). The answer also stated (pp. 8–9) that Broch's petition for judicial review had not attacked the scope of the Commission's order, and referred to the settled rule that a contention not presented to a reviewing court is deemed waived. Opportunity to respond on the merits was requested in the event the court should decide that the merits were open for consideration (answer, p. 10).

Broch requested leave to file a reply, and in its reply characterized the answer as resorting to "groundless technicalities" to preclude review of an "unduly restrictive injunction" based on a transaction "considered entirely lawful by this Court and four Justices of the Supreme Court" (reply, p. 3).

The court thereupon entered an order which recited the foregoing pleadings and denied Broch's motion to modify. However, it modified the Commission's order "[o]n the court's own motion", and affirmed the order as so modified (Appendix A, *infra*, pp. 12–13). The modification made by the court restricted the prohibitions of the order to transactions in which Canada Foods, Ltd., was the seller and The J. M. Smucker Company was the buyer—precisely the relief sought by Broch's motion to modify.

REASONS FOR GRANTING THE WRIT

1. The court below clearly erred in modifying the Commission's order by materially restricting its scope,

when the party against whom the order ran had raised no question as to the order's scope either in the Commission proceedings or on review, until after the case was remanded to the court of appeals upon reversal of its decision by this Court.

Moog Industries, Inc. v. *Federal Trade Commission*, 355 U.S. 411, likewise involved exercise by a reviewing court of its statutory power to "modify" a Federal Trade Commission order. This Court said (p. 414) that if the question respecting which modification was sought had not been raised before the Commission, "a reviewing court should not in any event entertain it." The Court's unqualified statement was an application of the general rule set forth in *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37, as follows:

> We have recognized in more than a few decisions,[4] and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

---

[4] Citing *Spiller* v. *Atchison, T. & S.F.R. Co.*, 253 U.S. 117, 130; *United States ex rel. Vajtauer* v. *Commissioner*, 273 U.S. 103, 113; *United States* v. *Northern Pacific R. Co.*, 288 U.S. 490, 494; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155.

The Commission's rules of practice, by requiring the party appealing from an initial decision to list "the questions involved and to be argued" (answer, p. 6a), underline the importance which the Commission attaches to presentation to it of alleged errors committed in the administrative proceeding. As this Court has pointed out (*Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499–500), the Senate Judiciary Committee report on the Administrative Procedure Act endorsed the rule barring a reviewing court from considering an alleged error in an administrative agency proceeding which had not been brought to the attention of the agency. The report stated (S. Doc. 248, 79th Cong., 2d Sess., 289, n. 21):

> A party cannot wilfully fail to exhaust his administrative remedies and then, after the agency action has become operative, * * * resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application of the time-honored doctrine of exhaustion of administrative remedies. * * *

The salutary rule against consideration by a reviewing court of an alleged error not presented to the administrative agency would be deprived of all substance if, as here, the court, while refusing to permit the party concerned to present the issue to the court, then undertook *sua sponte* to correct the asserted error. This Court has held such *sua sponte* action erroneous where review is pursuant to a statute barring consideration of an objection not urged before the agency, because intervention by

the court "on its own motion" would "seriously undermine" the policy established by Congress. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501. Whether the policy against permitting a party to attack an agency order upon a ground not presented to the agency is codified in the review statute or is a court-fashioned rule implied from applicable legal principles, the policy is equally undermined where the reviewing court intervenes on its own motion.

In the present case the error was compounded because the matter on which the court acted *sua sponte* had not even been presented to it in Broch's petition to review the Commission's order,[5] but was raised for the first time on remand from this Court, after the court below had rendered its final decision and its decision had been reversed by this Court. The judgment below thus stands as a precedent for untimely *sua sponte* judicial action, opening the door to a further, and we think wholly unwarranted, additional stage in administrative agency review proceedings, which unfortunately in many cases are already unduly protracted.[6]

2. Even if, contrary to what we have contended, the court was empowered on its own motion to restrict the scope of the order although Broch itself was precluded from asking such restriction, we sub-

[5] The statement in the review petition that the Commission's order is "vague" and "exceeds the statutory limits of Section 2(c)" (Record in No. 61, October Term, 1959, p. 214), does not raise the point that the order is too broad in scope, and no such point was made in Broch's court of appeals briefs.

[6] The Commission's order in this case was entered in December 1957 (Record in No. 61, October Term, 1959, p. 211).

mit that the court plainly erred in making the restriction which it wrote into the order. The Commission's order does not ban violation of § 2(c) in the broad, general terms of the statutory prohibition. The order bars violation in the precise manner in which Broch was found to have contravened the section—by reducing on sales to a particular buyer the brokerage commission charged on other sales for its principal, in order to enable sales to such buyer at prices below that charged in concurrent sales to others on behalf of its principal. The order properly proscribed such violation without limitation as to particular parties.

The Federal Trade Commission "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611, 613), and the Commission is "not required to limit its prohibition to the specific" violation found (*Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 474).

In view of these settled principles, the Commission plainly did not exceed its statutory authority in prohibiting a particularized kind of conduct found to violate § 2(c), without confining the prohibition to transactions between the one seller and the one buyer to which the evidence and findings relate. An order, particularized as to the kind of conduct barred but general as to those for whom and to whom the broker sells, is, we submit, the only kind of order which could be both effective and circumscribed to the kind of illegal conduct established by the evidence.

The court below apparently viewed *Communications Workers of America* v. *N.L.R.B.*, 362 U.S. 479, as holding, as a rule of law, that the prohibitions of an administrative agency order must be limited to conduct involving solely the party or parties as to which the evidence showed a statutory violation. We submit that the decision in *Communications Workers* turned on its particular facts, and established no inflexible general principle. In that case the Board had found that a local union whose members were employees of Ohio Consolidated Telephone Co., and the national union of which the local was a member, Communication Workers of America, had committed acts constituting unfair labor practices in the course of a strike by employees of Ohio Telephone. The Board's cease and desist order ran against both unions, and prohibited improper coercion of the employees of Ohio Telephone "or any other employer". This Court held that the quoted words should be eliminated. But the members of the local neither had nor could have "any other employer", and the national union was the collective bargaining representative for 730 local unions whose members were employees of approximately 100 employers, and it was only derivatively responsible (because of its approval and financial support of the strike by Ohio Telephone's employees) for the unlawful conduct found by the Board. On these facts (see petitioner's brief, No. 418, October Term, 1959, pp. 3–12), this Court concluded that inclusion in the order of the words "or any other employer" was unwarranted.

The Federal Trade Commission has advised the Solicitor General that it "has issued hundreds of orders under the Clayton Act", and that these "have consistently proscribed the unlawful practices found without being limited in application to the particular parties involved in the proved violations." The Commission fears that the judgment entered in the instant case will have a serious and detrimental impact on proceedings to review Commission orders directed against violation of the Clayton Act. The bearing of the *Communications Workers* decision on orders issued by other federal administrative agencies is also a matter of wide-spread importance.

CONCLUSION

This petition for a writ of certiorari should be granted.[1]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

PGAD B. MOREHOUSE,
Acting General Counsel,
ALAN B. HOBBES,
Assistant General Counsel,
Federal Trade Commission.

MARCH 1961.

---

[1] See *F.T.C.* v. *Carter Products*, 346 U.S. 327; *F.T.C.* v. *American Crayon Co.*, 350 U.S. 907; *F.T.C.* v. *Sewell*, 353 U.S. 969; *F.T.C.* v. *Crafts*, 355 U.S. 9 (summary reversals).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12305

HENRY BROCH AND COMPANY, A COPARTNERSHIP CONSISTING OF HENRY BROCH AND OSCAR ADLER, PETITIONERS, *v.* FEDERAL TRADE COMMISSION, RESPONDENT

November 3, 1960

Before Hon. JOHN S. HASTINGS, *Chief Judge;* Hon. F. RYAN DUFFY, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge.*

The court having considered the motion of Henry Broch and Company, petitioners, for leave to file a reply to respondent's answer, IT IS HEREBY ORDERED that said leave is hereby granted.

And the court having considered the motion of said petitioner to set aside or modify Commission order for reasons not considered in original opinion, respondent's answer thereto, and petitioners' reply to said answer, IT IS HEREBY ORDERED that petitioners' said motion be and the same is hereby denied.

On the Court's own motion IT IS HEREBY ORDERED that the order of the Commission is hereby amended and modified in the following respects:

Strike from the order of the hearing examiner, appearing on pages 194 and 195 of the joint appendix herein, which was adopted as the decision of the Commission, in its final order shown on page 197 of said joint appendix, the following language:

"or any other seller principal,"
"or to any other buyer,"
"or any other seller principal,"
"or to any other buyer,"

IT IS FURTHER ORDERED that the order of the Commission, as so amended and modified, be affirmed.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1960

FEDERAL TRADE COMMISSION, PETITIONER *v.* HENRY BROCH AND COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 1st, 1961.

(S) TOM C. CLARK,
Associate Justice of the
Supreme Court of the United States.

Dated this 31 day of January, 1961.

U. S. GOVERNMENT PRINTING OFFICE: 1961